IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-137

CHARLES DANIEL STEWART,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX, VIRGINIA

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Charles Daniel Stewart, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Circuit Court for the County of Fairfax, Commonwealth of Virginia, denying his Motion to Suppress Commonwealth's evidence entered, immediately after hearing, on September 8, 1978, and, thus, to review the constitutionality of Petitioner's subsequent conviction at trial held by that same Court on September 14 and 15, 1978.

OPINION BELOW

On May 31, 1979, the Supreme Court of the Commonwealth of Virginia issued a refusal (Appendix 1a, infra)[1] of Mr. Stewart's Petition for Appeal, this refusal and the judgments in the Fairfax, Virginia, Circuit Court referred to above are not reported.

JURISDICTION

The refusal of the Petition for Appeal by the Virginia Supreme Court was issued on May 31, 1979. (App. 1a) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

A. Did the Circuit Court for Fairfax County, Virginia, err in denying Mr. Stewart's pretrial motion to suppress Commonwealth's evidence after considering whether the conduct of Fairfax County Police officials (from the time Mr. Stewart voluntarily surrendered to authorities in Dade County, Florida, on June 15, 1978, through the time the recording of his alleged voluntary statement of confession was completed in Fairfax County during the early morning hours of June 24, 1978) represented psychological and physical coercion which overbore Mr. Stewart's will of self-determination, made his confession involuntary and denied his constitutional rights as mandated by the Due Process and Self-

[1]Hereafter noted as App.

Incrimination Clauses of the Fifth Amendment to the United States Constitution and resulted in an unconstitutional conviction for him; furthermore, and in a like manner, did this same police conduct work to deny Mr. Stewart's Sixth and Fourteenth Amendments right to counsel.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution made applicable to state proceedings through the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A Grand Jury indictment was returned against Charles Daniel Stewart on July 17, 1978, for one count of capital murder (App. 2a), the indictment being based upon the results of an investigation conducted by the Fairfax County Police Department which included an alleged voluntary statement of confession made by Mr. Stewart on June 23, 1978.

On September 8, 1978, the Honorable William G. Plummer, presiding without a jury, denied Mr. Stewart's motion (App. 3a) to suppress the alleged voluntary statement of confession and admitted same into evidence on behalf of the Commonwealth at trial. (App. 3a)

On September 14 and 15, 1978, Mr. Stewart was tried, by a jury for capital murder in the Circuit Court for the County of Fairfax, Virginia, the Honorable William G. Plummer presiding. Mr. Stewart was found guilty of the charge (App.

4a) with the jury prescribing his sentence to be death. (App. 4a)

On December 11, 1978, the Court entered an order sentencing Mr. Stewart to a term of life imprisonment. (App. 5a) A Petition for Appeal from the order entered on December 11, 1978, and from the denial of the motion to suppress Commonwealth's evidence on September 8, 1978, was duly made on March 2, 1979, to the Supreme Court of Virginia. The Petition was denied on May 31, 1979. (App. 1a)

STATEMENT OF FACTS

On the morning of June 15, 1978, Charles Daniel Stewart voluntarily surrendered himself to the Federal Bureau of Investigation's resident agent, William Scarborough, in the City of Homestead, Dade County, Florida. (S.T. 29;[2] T.T. 9/15, 18-19[3]) Mr. Stewart did this after learning of a warrant which had been issued by Fairfax County, Virginia, authorities for his arrest for murder. Mr. Stewart was processed into the Dade County, Florida, jail that same day. Also on that same day, Mr. Stewart was told by authorities at the Dade County Jail that he was to call an Investigator Boggess and a Sergeant Wilson in Fairfax County, Virginia, and he did so. (S.T. 30, 113) During the course of this conversation, Mr. Stewart was asked if he wanted to make a statement. (S.T. 113) When Mr. Stewart expressed apprehension on this point, Sergeant Wilson told Mr. Stewart

[2]S.T. refers to the transcript of the hearing of Mr. Stewart's Motion to Suppress Commonwealth's evidence (Criminal Docket No. 27466).

[3]T.T. 9/15 refers to the trial transcript of September 15, 1978. (Criminal Docket No. 27466).

that the authorities in Fairfax could convict him without his statement and that the punishment in Virginia for the crime with which he was charged was death in the electric chair. (S.T. 31-33; 113-114).

Following this telephone conversation, Mr. Stewart was held in the Dade County Jail until June 23, 1978, when Investigator Miles of the Fairfax County Police Department arrived there at about 10:00 a.m. to return him to Virginia, Mr. Stewart having waived his rights to try to prevent his extradition. (S.T. 33-34; 92-93; T.T. 9/15, 3) At this time, he was informed of his constitutional rights as defined by this Court's *Miranda* decision and was asked by Investigator Miles if he wished to make a statement. Mr. Stewart expressed uncertainty as to what he should do, however, he did state that he wanted to speak to an attorney. (S.T. 93; T.T. 9/15, 6-7, 9) According to testimony by Investigator Miles, Mr. Stewart, later that day, requested to speak to Investigator Boggess in Fairfax. (S.T. 98) Mr. Stewart, however, denies this (S.T. 42), maintaining in his testimony that he did not want to make a statement. (S.T. 38-39) Mr. Stewart also testified that he requested that an attorney, the resident FBI agent and the Commonwealth's Attorney be present at Fairfax before he would answer any questions. (S.T. 42)

It is appropriate to note that in his testimony at the hearing on his motion to suppress Commonwealth's evidence, Mr. Stewart testified that he had spent two sleepless nights in the Dade County jail preceding the arrival of Investigator Miles from Virginia, due to his concern for his circumstance and because of what was said to him during the telephone conversation on June 15, 1978, by Fairfax County Police officials. (S.T. 34)

At about 2:00 p.m. on June 23, 1978, Mr. Stewart was

taken by Investigator Miles and officials of the Dade County Police Department to Miami International Airport where he was held in custody until a flight departure time of 4:45 p.m. (T.T. 9/15, 8) During the flight from Miami to Washington, D.C., he again stated to Investigator Miles that he did not want to make a statement. (S.T. 39, 98)

Upon arrival at Washington's National Airport at about 6:00 p.m., June 23, 1978, Mr. Stewart was immediately taken by Investigator Miles to the Fairfax County Police Department arriving there at about 7:00 p.m. (T.T. 9/15, 9, 33) Booking procedures were begun. During this time, Investigator Boggess arrived at the police station (dressed in a T-shirt, shorts and sneakers, it being his day off), in response to a telephone call made by Investigator Miles. (S.T. 41; T.T. 9/15, 9)

It is Investigator Miles' testimony that at this time Mr. Stewart and Investigator Boggess were alone in a small room at Fairfax County Police Headquarters. (S.T. 102; T.T. 9/15, 9-10) However, Investigator Boggess testified that Investigator Miles was with him (Boggess) in the small room. (S.T. 121) What exchanges occurred between Mr. Stewart and Investigator Boggess during this time is unknown, however, it is Investigators Boggess' and Miles' testimony, respectively, that shortly after this meeting it was "determined" that Mr. Stewart had "agreed" to make a statement. (S.T. 121-122, 103) At this time, Mr. Stewart was told by the investigators that his father could not be present while his statement was being taken. No reason was given. (T.T. 9/15, 23-24) However, after Mr. Stewart was transferred to the Criminal Investigations Headquarters Building, he was allowed to telephone his father immediately before he began giving his statement. (T.T. 9/15, 23-24) During this telephone conversation, Mr. Stewart's father

allegedly tried to tell his son not to say anything. (S.T. 104)

At this time, prior to his making a statement, Mr. Stewart again expressed apprehension about saying anything. It is Investigator Boggess' testimony that Mr. Stewart was told that if he chose not to give a statement, then, in all likelihood none would be taken since they (the investigators) did not want to waste their time with him. (S.T. 52) Mr. Stewart was also told, according to Investigator Boggess, that the authorities in Fairfax could convict him without his statement and if he spoke with an attorney no statement would be sought because an attorney would not allow the taking of a statement. (S.T. 122-124; T.T. 9/15, 26-27) Further, it is Investigator Boggess' testimony that Mr. Stewart was told that his girlfriend and other companions could be implicated in the case. (S.T. 132-133)

At about 9:30 p.m., June 23, 1978, the tape recording of Mr. Stewart's statement was begun. (T.T. 9/15, 32) The recording was completed at about 11:40 p.m. that same night. Mr. Stewart was made to read his statement, page by page, as the stenographer completed the typing of each. This procedure ended at approximately 1:36 a.m., June 24, 1978. (S.T. 109) Mr. Stewart left the investigator's custody, according to Investigator Miles' trial testimony, at about 4:00 a.m., June 24, 1978, with him being admitted to the Fairfax County Adult Detention Center at 7:00 a.m., June 24, 1978, according to that center's records. (T.T. 9/15, 36)

It is appropriate to note that it is Investigator Boggess' testimony which states that the taped transcript included only those portions of what was said during the interrogation that the investigators thought to be important. (S.T. 125-126; 129-130) Further, Mr. Stewart had had very little or no sleep prior to being taken into custody by the Fairfax County Police, and he had been offered nothing to eat prior to his

being turned over to the Fairfax County Detention Center officials after his statement was obtained. (S.T. 58-59)

At the conclusion of his statement, during the early morning hours of June 24, 1978, Mr. Stewart requested that he be allowed to compose a handwritten answer to the question concerning whether any promises or threats had been made to him concerning his statement. His answer appears on page 61 of the transcript of his alleged voluntary statement of confession. (S.T. 86-88; T.T. 9/15, 112)

It is admitted by Mr. Stewart that during the foregoing events, he was shown printed forms of his constitutional rights and instructed by police officials as to the possible ramifications of his waiver of these rights. However, he maintains that in his case, the form of the protection afforded his constitutional rights is a whited sepulcher.

REASONS FOR GRANTING THE WRIT

A. MR. STEWART'S CONFESSION WAS INVOLUNTARY AND ITS ADMISSION INTO EVIDENCE AT HIS TRIAL FOULED THE CONSTITUTIONALITY OF HIS CONVICTION.

"To 'a confession forced from the mind by the flattery of hope, or by the tortue of fear . . . no credit ought to be given. *King v. Warickshall,* I Leach C.L. 263-264, 168 Eng. Rep. 234, 235 (K.B. 1783).' "

From common law roots such as this, a standard formulation of the voluntariness test began its development in the United States as early as 1897, when this Supreme Court in *Bram v. United States,* wrote:

"But a confession, in order to be admissible, must be

> free and voluntary: that is, must not be extracted by *any* sort of threats or violence, nor obtained by *any* direct or *implied promises, however slight,* nor by the exertion of *any improper influence* . . . A confession can never be received in evidence where the prisoner has been influenced by *any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner,* and therefore excludes the declaration *if any degree of influence* has been exerted." 168 U.S. 532, 542-543; 18 S.Ct. 183, 42 L.Ed. 468 (1897) [Emphasis added]

Charles Stewart relies on this "jealously guarded principle" for relief as others have more recently and successfully relied. See *United States of America v. Kim,* ____ F.2d____ , U.S. Ct. of Appeals D.C. Cir. No. 77-1172, 7-8 (Nov. 15, 1978). In recent decisions, this Supreme Court of the United States has reiterated the principle. In *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), though this Court vacated a reversal of the defendant's conviction by the Court of Appeals of Michigan, this Court did state: "We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether 'his right to cut off questioning' was 'scrupulously honored." 423 U.S. at 104. In *Mosley,* the defendant was properly advised of his rights on two occasions by two different officers within a period of two hours. After these warnings were given, the defendant was questioned concerning an unrelated holdup murder. At no time did the defendant indicate that he did not want to discuss this crime which was wholly unrelated to the crimes with which he was charged. Also, the defendant did not, in any manner, indicate that he wished to speak with an attorney. This Court found determinative the fact that:

"This is not a case, therefore, where the police failed to

honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." 423 U.S. at 105-106.

In 1977, this Court relied on the principles in *Michigan v. Mosely,* in deciding the case of *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), thus:

"The reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, *the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence* to make a statement without counsel's presence may properly be viewed with skepticism." 430 U.S. at 405 N10. [Emphasis added]

The resultant skepticism caused by the circumstances in *Brewer* resulted in a granting of the defendant's petition for a Writ of Habeas Corpus with this Court affirming the decision of the United States Court of Appeals for the Eighth Circuit. In *Brewer,* the defendant, charged with murder, made incriminating statements to police while being transferred by automobile. During the trip the defendant expressed no willingness to be interrogated in the absence of his attorney but instead stated several times that he would make a

statement after seeing his attorney. However, one of the police officers, who knew that the defendant was formerly under psychiatric care and was deeply religious, sought to obtain incriminating admissions from the defendant by stating to him during the drive that he felt the victim's body should be found because the victim's parents were entitled to a Christian burial for their little girl who was taken away from them on Christmas Eve.

In considering these facts, this Court stated:

"We have said that the right to counsel does not depend upon a request by the defendant, *Carnley v. Cochran,* 369 U.S. 506, 513, 8 L.Ed. 2d 70, 82 S.Ct. 884; cf. *Miranda v. Arizona,* 384 U.S. at 471, 16 L.Ed. 694, 86 S.Ct. 1602, 10 Ohio Misc. 9, 36 Ohio Ops. 2d 237, 10 ALR 3d 974, and that courts indulge in every reasonable presumption against wavier, e.g., *Brookhart v. Janis,* Supra, at 4, 16 L.Ed.2d 314, 86 S.Ct. 1245, 7 Ohio Misc. 77, 36 Ohio Ops. 2d 141; *Glaser v. United States,* 315 U.S. 60, 70, 86 L.Ed. 680, 62 S.Ct. 457. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings. *Schneckloth v. Bustamonte,* 412 U.S. 218, 238-240, 36 L.Ed.2d 854, 93 S.Ct. 2041; *United States v. Wade,* 388 U.S. 237, 18 L.Ed.2d 1149, 87 S.Ct. 1926.

We conclude, finally, that the Court of Appeals was correct in holding that, judged by these standards, the record in this case falls far short of sustaining [the State's] burden. *It is true that [the defendant] had been informed of and appeared to understand his right to counsel. But waiver requires not merely comprehension but relinquishment. . .*

His statements while in the car that he would tell the whole story *after* seeing [his retained counsel] were the clearest expressions by [the defendant] himself that he desired the presence of an attorney before any interro-

gation took place . . . Despite [the defendant's] express *and implicit* assertions of his right to counsel, [the detective] proceeded to elicit incriminating statements from [the defendant]." 430 U.S. 404-405. [Emphasis added].

Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), again confirmed the reliability of the mandates of the *Bram,* supra, decision by relying on *Bram* to determine the voluntariness of the guilty plea in *Brady.* This Court wrote:

"*Bram* is not inconsistent with our holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial [life imprisonment versus a death penalty]. *Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too difficult to assess.*

Brady's situation bears no resemblance to Bram's. Brady first pleaded not guilty; prior to changing his plea to guilty he was subjected to no threats or promises in face-to-face encounters with the authorities. He had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; *there was no hazard of an impulsive and improvident response to a seeming but unreal advantage.*" 397 U.S. 759, 76. [Emphasis added]

Schneckloth v. Bustamonte, 412 U.S. 218, 225-226, 93 S.Ct. 2041 36 L.Ed.2d 854 (1973), developed, further, the relevant factors to be considered in determining the quality of

the voluntariness of any confession in this way:

"This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forego all questioning, nor that they be given Carte Blanche to extract what they can from suspect. 'The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. *Is the confession the product of an essentially free and unconstrained choice by its maker?* If it is, if he has willed to confess, it may be used against him. If it is not, *if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process*', *Culombe v. Connecticut,* supra, 602, 6 L.Ed.2d 1037.

In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., *Haley v. Ohio,* 332 U.S. 596, 92 L.Ed. 224, 68 S.Ct. 302 . . . the length of detention, e.g., *Chambers v. Florida* [309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716]; the repeated and prolonged nature of the questioning, e.g. *Ashcraft v. Tennessee,* 322 U.S. 143, 88 L.Ed. 1192, 64 S.Ct. 921; and the use of physical punishment such as the deprivation of food or sleep, e.g., *Reck v. Pate,* 376 U.S. 433, 6 L.Ed. 2d 948, S.Ct. 1541.

The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; *each reflected a careful scrutiny of all the surrounding circumstances.* [Citations omitted]" (Emphasis added, see also *Bouldon v. Holman,* 394 U.S. 478, 480, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969).

This Supreme Court of the United States has also recognized the unique insidiousness and effectiveness of subtle and gentle coercion and its bearing on the constitutional voluntariness of confessions. In *Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), confessions given by police officers concerning traffic ticket fixing, under threat that silence might affect their job status, were held by this Court to be unconstitutionally forced. In arriving at its decision, this Court wrote:

> "Coercion that vitiates a confession under *Chambers v. Florida,* 309 U.S. 227, 84 L.Ed. 716, 60 S.Ct. 472, and related cases can be *'mental as well as physical'*; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn v. Alabama,* 361 U.S. 199, 206, 4 L.Ed.2d 242, 80 S.Ct. 274. *Subtle pressures (Leyra v. Denno,* 347 U.S. 556, 98 L.Ed. 948, 74 S.Ct. 716; *Haynes v. Washington,* 373 U.S. 503, 10 L.Ed.2d 513, 83 S.Ct. 1336) may be as telling as course and vulgar ones. *The question is whether the accused was deprived of his 'free choices to admit, to deny, or to refuse to answer.' Lisenba v. California,* 314 U.S. 219, 241, 86 L.Ed. 166, 182, 62 S.Ct. 280." 385 U.S. 496 [Emphasis added]

See also *Hutto v. Ross,* 429 U.S. 28, 30, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976); and see generally *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1946).

Throughout the variables involved in these considerations, the basic determinants of voluntariness remain unchanged:

> "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case . . . The Courts must presume that a defendant did not waive his rights, the prosecution's burden is great . . .

> . . . the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.'" (Citations omitted) *State of North Carolina v. Willie Thomas Butler,* ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (April 24, 1979).

It is found that the Federal Courts, for purposes of this petition, those which preside in Virginia, maintain an undistorted continuum of the constitutional interpretations of this United States Supreme Court cited above. In the case of *United States v. Grant,* 549 F.2d 942 (1977), the United States Court of Appeals for the Fourth Circuit affirmed the defendant's conviction for armed bank robbery, finding his confession to be voluntary and admissible. The court found the confession to be spontaneous, developing from a conversaion initiated by the defendant with FBI agents. The Court determined that the investigator's conduct was beyond reproach since they had immediately and completely ceased all discussion about the robbery itself after the defendant had requested an attorney, seeking only standard identification information. The court wrote:

> "It is true that when [the defendant] requested counsel, *Miranda* imposed upon investigating officers the duty to cease any questioning of the accused about the crime under investigation and not to resume until the accused had been given a reasonable opportunity to secure counsel or had been offered and refused counsel. This does not mean, though, that the accused, may not later waive his earlier request for counsel, though such waiver is not to be lightly assumed . . . as Justice White observed in *Michigan v. Mosley* [citation omitted] waiver of an accused's right to counsel, after such right has been asserted 'may properly be viewed with skepticism'. And this 'skepticism' finds increased justification if there is no substantial lapse of time between

the request for counsel and its alleged waiver . . . *the conduct of the investigating officer after the right to counsel is asserted must be scrutinized with special care for any possibility of imposition, coercion or unfair suggestion. . .*

* * *

Nor does *Miranda* protect an accused, even though he has requested counsel, from a *spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers."* 549 F.2d 945-946 [emphasis added].

More closely on point with Mr. Stewart's situation in Virginia is the Fourth Circuit, United States Court of Appeals case, *Ferguson v. Boyd,* 566 F.2d 873 (1977), where the defendant's petition for a Writ of Habeas Corpus was granted due primarily to what the court determined to be the involuntariness of his confession. In that case, the Court of Appeals maintained that involuntary confessions could result from "mental coercion as well as physical abuse." 549 F.2d at 877; that

> "The ultimate question is whether *the pressure, in whatever form,* was sufficient to cause the petitioner's *will to be overborne and his capacity for self-determination to be critically impaired. Culombe v. Connecticut,* 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961). . . As the Supreme Court stated in *Blackburn v. Alabama,* 361 U.S. 199, 206, 80 S.Ct. 274, 279, 4 L.Ed.2d 242 (1960):
>
> > 'A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, *by more sophisticated modes of persuasion* . . .'
>
> In as much as the degree of pressure necessary to crush one's will varies with the individual and the circumstances of the arrest and detention, a finding of coercion and involuntariness must be based upon a careful consideration of *the totality of the circumstances. Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) [Emphasis added]."

The defendant, in *Ferguson,* was held in custody for one week without hearing, as was his girlfriend (as was Mr. Stewart held in Florida). The Court of Appeals determined that as a result of the manipulation of the defendant, his girlfriend and his male companions by police authorities, the defendant's confession resulted from a desire to ease his girlfriend's dilemna and was therefore brought on by psychological coercion and calculated pressures in violation of due process. See generally *Redd v. Peyton,* 303 F.Sup. 320, 324-325 (W.D.Va. 1969) (Some elements considered in *Redd* as part of the "totality of the circumstances" were: the age, intelligence, education and background of the individual; *the atmosphere in which the individual was placed;* the length and demeanor of the interrogation; any physical force or threats used; any psychological coercion usedas promises and inducements; *and incommunicato detention*). See also: *Word v. Slayton,* 337 F.Sup 19 (W.D.Va. 1972); *Burton v. Cox,* 312 F.Sup. 264 (W.D.Va. 1970); *Griffin v. Peyton,* 284 F.Sup. 650 (W.D.Va. 1968); *Gibson v. Peyton,* 262 F.Sup. 574 (W.D.Va. 1966); *Cortez v. United States,* 337 F.2d 699 (9th Cir. 1964); *Kent v. United States,* 272 F.2d 795 (1st Cir. 1959).

It is necessary to include here the United States District Court case of *United States Ex Rel. Sanders v. Rowe,* 460 F.Supp. 1128 (N.D. Ill, E.D. 1978) because of its close similarity to Mr. Stewart's case on one point, vis.

"After petitioner requested a lawyer, the detectives told

him that they had a strong case against him and that he would almost certainly be convicted and sentenced to a minimum of four years in prison. They described the substance of their case to him, including the fact that they had obtained an oral statement from [a second defendant] and a written statement from [a third defendant]. When the petitioner asked to see Manley's statement, the detectives refused to show it to him . . . A few minutes later, petitioner agreed to give a statement and signed a written waiver form. This statement admitted an involvement in the armed robbery . . ." 460 F.Sup. 1132.

In granting the petitioner's Writ of Habeas Corpus, the District Court quoted from *Miranda* as they declared a violation of Due Process:

" '. . . [a] valid waiver will not be presumed simply from the silenceof the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. . . Any evidence that the accused was threatened, trickered, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.' " [460 F.Sup. 1135]

Finally, the Fourth Circuit case of *United States v. Clark*, 499 F.2d 802 (4th Cir. 1974) is most easily applicable and contrastable to Mr. Stewart's situation. In *Clark*, the defendant was arrested for bank robbery, informed of his rights and immediately taken before a magistrate for a bond hearing and an indigency determination. Following this procedure, the two arresting officers informed Clark that they wanted to interview him concerning the robbery. The defendant was informed again of his rights and he stated "I had better talk to a lawyer", 499 F.2d at 805. The agents then told Clark "that such a request effectively ended the interview." *Ibid*, and they left the place where Clark was being held. Four hours later the two agents returned to the jail

to fingerprint Clark:

"The three were in a small rectangular room with no one else present. Agent Kenny, who admits that he was the *initiator* of a conversation concerning interrogation, asked Clark to submit to further questioning regarding the bank robbery. Even though the agents knew that Clark only four hours earlier had expressed the desire for the advice of counsel and he had no attorney yet, they continued their efforts to persuade him to answer their questions. When Clark persisted with his claim of mistake Agent Kenny made the following statement:

'If, in fact, you have nothing to do with any of this, you have nothing to fear from us. In other words, you have nothing to lose. On the other hand, if you are involved, then it will come around you.'

Next the officers told Clark that his friend, English, had made serious allegations against him in a confession. Although Agent Kenny stated that he could not recall with certainty, in all likelihood he stated that Clark would be better off if he told the truth. The agents read Clark his rights from the waiver form and had him read them again. Clark refused to sign a waiver of his rights but did consent verbally to submit to questioning without an attorney present." *Ibid.* The interrogation lasted fifty-six minutes.

In considering these facts the Court of Appeals asserted that the issues of the voluntariness of a confession and the voluntariness of the waiver of the right to counsel were virtually impossible to separately analyze, with evidence on one issue being relevant to the other. The Court also considered whether appropriate safeguards were taken to insure that the defendant's statement was a product of free choice, citing *Miranda*, 499 F.2d, 806-807. The "totality of all the surrounding circumstances" principle in *Schneckloth*, supra, was also quoted. 499 F.2d 807. The Court of Appeals

in *Clark* concluded that the defendant's confession was involuntary and reversed his conviction stating:

> "We recognize the possibility that, under given circumstances, an accused may later waive a right which he previously asserted. *Dillon v. United States,* 391 F.2d 433, 437 (10th Cir. 1968). However, evidence that an accused has previously asserted his right to confer with counsel is a factor which weighs heavily against a finding that a subsequent uncounseled confession is voluntary. See *United States v. Slaughter,* 366 F.2d 833, 840-841 (4th Cir. 1966)." *Ibid.*

(In *Slaughter,* the defendant's statement was held to be involuntary though the second interview took place some twenty-five hours after the first.) In the words of the Court of Appeals addressing Clark's situation: "At the very least, the agents should have afforded Clark sufficient time to employ and consult with counsel before *they initiated* any subsequent interview." *Ibid.* See generally *Scatterfield v. Zahradnick,* 572 F.2d 443 (4th Cir. 1978); *Hunt v. Cox,* 312 F.Sup. 637 (E.D.Va. 1970).

The following passages and case citations are presented as representative of the judicial consideration given the voluntariness question in Virginia, and as having had application to Mr. Stewart's case during judicial proceedings there:

> "... our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independant labors, rather than by the cruel, simple expedient of compelling it from his own mouth ...
>
> At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. ... such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere ...

> "'The circumstances surrounding in custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment privilege under the system we delineate today ...'" *Durham v. Commonwealth,* 208 Va. 415, 419, 158 S.E.2d 135, 139 (1967); see generally *Cardwell v. Commonwealth,* 209 Va. 68, 161 S.E.2d 787 (1968); *Dailey v. Commonwealth,* 208 Va. 452, 158 S.E.2d 731 (1968).
>
> "*Miranda* does not apply to 'any statement given freely and voluntarily without any compelling influences'. [Citation omitted]. But since [the defendant] confessed after questioning by the police and while he was still in custody, his confession was subject to compelling influences and should not have been admitted in evidence [citation omitted]." *Dean v. Commonwealth,* 209 Va. 666, 668, 166 S.E.2d 228, 230 (1969). See generally *Hammer v. Commonwealth,* 207 Va. 135, 148 S.E.2d 878 (1966); *Jackson v. Commonwealth,* 116 Va. 1015, 81 S.E. 192 (1914).
>
> "If defendant had desired to end the interrogation, he could have simply said, 'I do not want to answer any more questions' [Citation omitted]. There was nothing coercive or deceitful in the manner in which the officers conducted the interrogation which caused defendant to continue answering their questions. See *Land v. Commonwealth,* 211 Va. 223, 229, 176 S.E.2d 586, 590 (1970).
>
> Moreover, defendant testified that when he made the statements to the officers ... he had not been threatened or offered any promises of reward or leniency ..." *Akers v. Commonwealth,* 216 Va. 40, 46, 47, 216 S.E.2d 28, 32 (1975); see also *Burton v. Peyton,* 210 Va. 484, 171 S.E.2d 822 (1970).

"An accused may waive his constitutional right to the presence of an attorney, either retained or appointed, provided the waiver is made voluntarily, knowingly and intelligently [citations omitted].

The evidence in the instant case shows that the defendant initiated the conversation with the detective concerning the charges against him. The detective interrupted and again advised him of his constitutional rights, which included his right to have his retained counsel present before making any statement. Defendant then voluntarily, knowingly and intelligently waived his right to the presence of his attorney and confessed to the commission of the crimes." *Skinner v. Commonwealth*, 212 Va. 260, 263, 183 S.E.2d 725, 728 (1971); see also *Taylor v. Commonwealth*, 212 Va. 725, 187 S.E.2d 180 (1972).

"At 'one point' in the interview, the defendant stated he 'would like to talk to an attorney.' However, 'immediately after making request for an attorney' but before [the investigator] said 'anything' the defendant 'began to ask [the investigator] questions about the offense.' [The investigator] answered the inquiries and 'shortly after that [the defendant] gave [the investigator] the confession.' The interview lasted 'thirty minutes or so' and was free of coercion or duress.

Indisputably, *Miranda* requires that if, during custodial interrogations, 'the individual states that he wants an attorney, the interrogation must cease until an attorney is present.' 384 U.S. at 474. This does not mean, however, 'that the accused may not later waive his earlier request for counsel, though such waiver is not to be lightly assumed. The burden of establishing such waiver by the preponderance of the evidence, however, rests upon the [prosecution] and that burden is a heavy one, requiring convincing evidence.' *United States v. Grant*, 549 F.2d 942, 945 (4th Cir. 1977) (footnotes omitted) . . .

In affirming Grant's conviction, the court stated that *Miranda* does not 'protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investigating officers' . . .

We agree with this rationale . . ." *LaBonte v. Commonwealth*, 217 Va. 677, 678-679, 232 S.E.2d 738, 738-739 (1977); see genrally *Owens v. Commonwealth*, 218 Va. 69, 235 S.E.2d 331 (1977).

"Factual findings of voluntariness are not disturbed on review unless plainly wrong.[2]. . .

[2]mainfestly, a determination of voluntariness based upon a misapplication of constitutional standards is plainly wrong.

One may infer, or pretend to infer, what another never intended to imply. The defendant says he inferred coercion from [the investigator's] statements. [The investigator] says he intended no implication of coercion. Even if [the defendant] in fact drew such an inference, there would be no coercion proscribed by the fifth Amendment, unless that inference were one a reasonable man would draw." *Witt v. Commonwealth*, 215 Va. 670 at 675 (1975).

Mr. Stewart submits that all of the case law cited above not only provides the correct interpretation and application of the particular Fifth, Sixth and Fourteenth Amendment rights involved in each instance, but that it also provides sufficient justification to recognize the prayer in this petition.

It is evident from the record of the testimony given by Mr. Stewart and Investigators Miles and Boggess during the suppression hearing held on September 8, 1978, and from the record of the testimony given at trial by Investigator Miles on September 15, 1978, that the following points firmly support the contention that Mr. Stewart's constitu-

tional rights to counsel and to remain silent were violated in a manner which requires issuance of a Writ of Certiorari to review the judgments in the Circuit Court for the County of Fairfax, Virginia:

1. It is submitted that Mr. Stewart's length detention, in the Dade County, Florida, jail, from June 15, 1978, until June 23, 1978, when he was transported back to Virginia, was unreasonable and that this waiting period worked to create and unduly amplify apprehension, worry and fear in the mind of Mr. Stewart concerning his predicament. This is where the element of subtle coercion, condemned most effectively by *Garrity* and *Ferguson,* supra, began its undermining effect on the will of self-determination of Mr. Stewart:

"Q. And when had you been told to expect Investigator Miles?

A. Wednesday [June 21, 1978]. First it was Monday [June 19, 1978]. Then it was moved to Wednesday [June 21, 1978] and then they didn't get there until Friday [June 23, 1978].

Q. In what emotional state were you when he finally arrived on the morning of Friday, June 23rd?

A. I hadn't had any sleep for over two days, two or three days. I just couldn't sleep in there, you know, because I was worried about them coming down and threatening me." [S.T. 34]

2. It is submitted that what was said by Sergeant Wilson of the Fairfax County Police Department, to Mr. Stewart during the telephone conversation on June 15, 1978, (S.T. 30-33, 113-114) added to the unconstitutionally coercive atmosphere of Mr. Stewart's detention in Florida; it should be noted, again, that Mr. Stewart was directed to make this

call by a message sent to the Dade County Jail by authorities in Fairfax County (S.T. 30):

"The Defendant: All right, the conversation with the party up here, I said, 'Hello, this is Mr. Stewart,' and they go 'good I'm glad you called', or something like that.

One of the two men said that if I didn't tell them that Jimmy Clark had pulled the trigger, that I would be brought up here to trial and sentenced to the chair . . . [S.T. 31-32]

Q. Now what did you tell the parties here in Fairfax during that telephone conversation with regard to making a statement?

A. I told them I had nothing to say.

Q. And did that conclude the telephone conversation?

A. No, I said something else. I said 'I don't know why you people are treating me like this', and then I just hung up on them . . . [S.T. 33]

[Investigator Boggess:]

Q. Do you recall what Sergeant Wilson said with regard to whether or not he needed a statement from Mr. Stewart to get a conviction?

A. I don't recall precisely, Mr. Brent. I think it was something along the line that we didn't need the statement or something like that.

Q. Along the lines of what?

A. That we didn't need his statement or something like that.

Q. That you could get him convicted even without a statement?

A. I believe it was something like that. I can't recall exactly what Sergeant Wilson said.

Q. Was it something to the effect or could it have been something to the effect that he would go to the

electric chair whether or not he made a statement or not?

A. I recall the word electric chair being used. I don't recall exactly what content it was used as to whether or not we could get him convicted of first degree murder which would — of capital murder which would be the death penalty.

Q. Would it be fair to say that you came away from that telephone conversation and listening to Sergeant Wilson with kind of a negative feeling?

The Witness: When you speak of negative —

By Mr. Brent:

Q. I am talking about his comments over the telephone.

A. I wouldn't say negative in a sense. I don't think I would have handled it myself that way . . .

Q. Would it be fair to say that his remarks were inappropriate?

A. That would only be an opinion of mine." [S.T. 113-114; 118-119].

It is further submitted on this point that discussion of the probable execution of Mr. Stewart, even if he remained silent (as is his constitutional perogative), and discussion of the method which would be used to execute him, can only be termed the most insidious form of coercion, remembering that Mr. Stewart had been requested by Fairfax County Police authorities to make the telephone call. Furthermore, there could be found no indication in the record where either Sergeant Wilson or Investigator Boggess advised Mr. Stewart of his constitutional rights, as defined by the Supreme Court's *Miranda* decision, as the necessary prologue to the meat of their telephone conversation.

3. It is submitted that it was at least irresponsibly, if not intentionally, planned that Mr. Stewart be returned to

Fairfax County late on a Friday afternoon, to-wit: Mr. Stewart remained in Florida from the early morning hours of June 15, 1978 (S.T. 29, T.T. 9/15, 18-19) until a flight departure time of 4:45 p.m. on Friday, June 23, 1978 (T.T. 9/15, 8); arriving at National Airport, Washington, D. C., at about 6:00 p.m., June 23, 1978, and finally at Fairfax Police Headquarters at 7:00 p.m. that day. (T.T. 9/15, 9, 33) At this time of day no Circuit or District Courts are sitting; thus was avoided the necessity of bringing Mr. Stewart immediately before one of those Judges to formally inform him of the charges against him and, if he desired, to have an attorney provided for him; furthermore, there could be no indication in the record that he was, in fact, ever brought before even a magistrate to provide for these necessary procedures. It is further submitted that immediate commitment to the Fairfax County Adult Detention Center at this point until the following Monday, when Mr. Stewart could have been brought before a judge and provided with an attorney, would have been the correct procedure to follow. This failure multiplied the coercive atmosphere surrounding Mr. Stewart and also infringed upon his rights to Due Process and Counsel.

4. It is submitted that Mr. Stewart was held under the swelling, coercive influence of Fairfax County Police authority from the time of the June 15th telephone conversation until his commitment to the Fairfax County Adult Detention Center (sometime after his alleged voluntary statement of confession was completed) during the early morning hours of June 24th. (T.T. 9/15, 36) This unduly coercive atmosphere was maintained and allowed to build despite Mr. Stewart's assertions that he did not want to make a statement and that he thought he should speak with an attorney. It is alleged that at times these assertions by Mr. Stewart were coupled with indications of confusion as to just what he should do. Even if

this is true, the cases cited above confirm that any indication that an individual wishes to remain silent and wishes to speak with an attorney should be scrupulously honored, and any later waiver of these protections, especially if made in an environment which even slightly smells of undue influence, should be the subject of skepticism, since the law cannot measure the impact of such influence upon the will of self-determination of a particular individual. The record provides the following:

"Q. Now, what did you tell the parties here in Fairfax during that telephone conversation with regard to making a statement?

A. I told them I had nothing to say [S.T. 33]. . .

Q. What did Investigator Miles say about Mr. Clark's statement or confession [in Florida]?

A. Basically —

Q. To you?

A. He said he had done it. That he had pulled the trigger and everything.

Q. What did you think? What did you believe when he said that they had enough evidence to convict you even if you didn't give a statement?

A. I believe that Jimmy Clark had said that I willfully helped him [S.T. 37]. . .

Q. What impression did you have as a result of Investigator Miles' remarks?

A. That if I made a statement at that time of what really happened, that I would clear myself [S.T. 35]. . .

Q. After you went over that warning and consent form with Investigator Miles, what did you say to him?

A. I just told him I wasn't going to make any kind of statement at this time [S.T. 38]. . .

A. Mr. Miles on several occasions on the flight up, you know, told me he thought personally that I was an all right person and he thought I should go ahead and give a confession in order to help the state with their case against Jimmy and Jamie and Betty.

Q. And this was after you told him that you didn't want to make a statement?

A. Right.

Q. And you wanted to remain silent?

A. Uh-huh [S.T. 39] . . .

Q. What did you think when he kept talking to you about making a confession and telling you that you ought to make a confession?

A. Well, he kept on saying he could get a conviction anyway, so I thought at the time, you know, that Jimmy had, you know, implicated me as, you know, going along with everything willfully and this, that and the other and I believed exactly what the man said. [S.T. 39]. . .

The Defendant: Yes. I was fingerprinted and I guess what you would consider booked. I was handed copies of my charges.

By Mr. Brent:

Q. Charges or warrants?

A. Right, and photographed and also asked again whether I would make a statement.

Q. If you what?

A. If I would reconsider making a statement.

Q. Who asked you that?

A. Mr. Miles.

Q. What did you respond?

A. I said no. [S.T. 40-41]

A. I [the defendant] told [Investigator Miles] that I had left directions with the FBI in Homestead, Mr. Scarborough down there, Bill Scarborough, that I wanted a State's Attorney present, a lawyer appointed and one of the local FBI agents there before I answered any questions. [S.T. 42]

. . .

Q. Now at [Fairfax] Police Headquarters you told them you didn't want to give a statement. Is that right?

A. Correct. [S.T. 42] . . .

Q. Now, where were you taken from police headquarters?

A. I was told I was being taken right to the jail but I was taken to some underground — it was a building that was above ground, but they took me into like a garage area and took me up a couple of floors to Criminal Investigation Division.

Q. Would you tell us what happened there.

A. Miles took me over and Mr. Boggess came in shortly after that. They put me in this little room and [I] kept on asking if I could call my father . . .

A. I asked them whether he could come over to see me that evening.

Q. And what was said in reply to that?

A. No.

Q. Was there a reason for that?

A. They just outright said no at that time.

Q. And what was your position at this point with regard to giving a statement?

A. I had told them up until then no. [S.T. 42-44]

A. Well, Mr. Boggess had told me the same thing that Mr. Miles had that they could get a conviction and

the penalty for that is the death penalty, the electric chair.

They kept on asking me, you know, that the only way to clear myself if I am not guilty is to give them a statement.

Q. What if anything did they say about other individuals?

A. They just said that Jimmy had given a statement and they pointed on the desk that was in the little room they had me and they said it's 48 pages and there it is.

Q. Did you read that statement?

A. No, I didn't. I had a chance to glance at it a couple of times when they had it open.

Q. Did they mention what would happen to any other people aside from Clark?

A. They asked me if — first they asked me where Lea was, Lea Frazier which was my girlfriend at the time and also what I thought would happen to her.

Q. Anybody else?

A. No.

Q. And what did you infer from their remarks about Lea Frazier?

A. I figured they were going to try to charge her with something. [S.T. 45-46]

Q. What did you mean by that, you figured?

A. They asked me where was Lea and what I thought would happen to her.

Q. Okay.

A. Then I got the feeling that they were going to try to charge her if I didn't give a statement at the time.

Q. What if anything was said about the electric chair?

A. They told me that is the penalty in Fairfax County for supposedly a murder for hire.

Q. Did you eventually call your father?

A. Yes, I did.

Q. What did you tell him?

A. I told him that I was over here and what time I had arrived and everything and what had happened up to that point and asked him whether Lea was okay and I told him that — I told my father that I think I better give a statement so they don't charge Lea and so I could clear myself.

Q. What if anything was said by the investigator with regard to a lawyer or your getting a lawyer?

A. They told me that there was no sense in even bothering giving a statement with a lawyer because lawyers would make me hide true facts and everything in the case.

Q. What was said about —

THE COURT: Who said that, sir?

THE DEFENDANT: Mr. Boggess.

BY MR. BRENT:

Q. What was said about your retaining a lawyer or being able to get a court appointed lawyer?

A. They said that — they asked me whether I was going to get my own lawyer or use one appointed by the State and I told him I didn't have the funds at the time. That I had to use a Court appointed lawyer and Mr. Boggess and Mr. Miles just smiled at each other.

I didn't know what it was for. Mr. Boggess said — the feeling I got when he said it, I'm not sure exactly what he said, but the feeling I got was that I wasn't going to get a good trial with any kind of Court appointed lawyer.

I'm not sure exactly what he said about it. Something to the degree that they are all over-worked and underpaid or something like that and they just try to run through the cases as quick as they could.

THE COURT: Who said that, sir?

THE DEFENDANT: Mr. Boggess.

BY MR. BRENT:

Q. What if anything was said about your getting a lawyer there to be with you?

A. They dold me that they wouldn't even take a statement unless I gave it to them right then and there.

Q. Why did you get that impression?

THE COURT: Who said that? Let's be sure we know that.

THE DEFENDANT: Mr. Boggess [S.T. 47-49]

Q. What was said to you about whether or not a statement would be taken if you got a lawyer to be present with you?

A. They told me there is no sense in even bothering taking a statement from me if they don't take it right now. That a lawyer would make me hide facts.

Q. What did you think as a result of that remark?

A. I figured they weren't — if I didn't make a statement right then and there they were going to end up charging Lea with something and that I could never have a chance of making a statement. [S.T. 50]

A. I told Mr. Miles I know at least a couple of handfuls of times, you know, ten or fifteen times. I also told Mr. Boggess when he came up here when we were over in the little short building that I wasn't going to give a statement.

Q. What if anything did Investigator Boggess do when you told him that you were not going to make a statement after he had called in a typist? [S.T. 51]

A. After he called the typist in?

Q. Yes.

A. He said Mr. Stewart — he got kind of upset. He goes, "Mr. Stewart, please quit wasting our time. Are you going to give a statement or not? I have already called the girl and she is coming in from home."

Q. Do you remember about what time that was?

A. That was about ten, fifteen minutes after I talked to my father.

THE COURT: About what time was that?

BY MR. BRENT:

Q. About what time did you talk to your father?

A. I think it was about nine or 9:30, guess.

Q. So, you had been — you say you arrived at National about six?

A. Right.

Q. And you had been in their custody for approximately three hours?

A. Right.

Q. Here in Northern Virginia?

A. Uh-huh.

Q. How many times had you told them that you were not going to make a statement? [S.T. 52]

THE DEFENDANT: Probably two or three times to Miles and at least two or three times to Investigator Boggess.

BY MR. BRENT:

Q. Now, did there come a time when you finally did execute a warning and consent form?

A. Yes.

Q. Why did you sign that document?

A. I didn't have any other choice. It was either clear myself then or, you know, be sent to the chair.

Q. What do you mean by clearing yourself then?

A. Well, if I didn't give a statement right then, they weren't going to give me a chance to make a statement at a later date. [S.T. 53-54]

Q. What did he respond?

BY INVESTIGATOR MILES:

A. At that time he stated he didn't know if he wanted to talk to me at that time or not. I advised him that I was not here to play games with him or to trick him or anything like that.

I said you are going to be transported back to Virginia later on this afternoon. I said if you want to give a statement, it's up to you.

He said well, I think I want to talk to an attorney. [S.T. 93]

Q. So, he did not make a statement at that time?

A. No.

Q. Did he tell you that he did want to make a statement?

A. He stated he wasn't sure what he wanted to do. [S.T. 95]

Q. Did you tell him or when did you tell him about Clark's confession or statement?

A. Prior to leaving and prior to ending the short conversation we had there in the area. I advised him, I said, "as I told you before, we are not going to pull any wool over your eyes or lie to you." I said, "Clark has been arrested. He is in California and he has given a statement."

I told him I don't know what the details of the statement are but I just want you to know that this has occurred. [S.T. 96]

A. Mr. Stewart never gave a written statement.

Q. Well, an oral statement that was transcribed and signed.

A. Yes, sir.

Q. You were present during all that?

A. That's correct, sir.

Q. And you remember one of the last paragraphs where he said that Detective Boggess had told him that I can be convicted even if I don't give a confession? You don't remember that?

A. At that time, yes, but now down in Florida, no such statement was made.

Q. I said at anytime. My question was at anytime did you hear anybody tell him that?

A. Yes, I heard the statement. [S.T. 97]

Q. So, it's clear to you he didn't want to give a statement at that point?

A. That's correct. [S.T. 98]

Q. All right, sir. Why didn't you take him to the jail after Boggess appeared?

A. Because he wanted to talk to Investigator Boggess and while I was arranging the necessary paper work to be attached to the warrant for proper processing, Investigator Boggess and Mr. Stewart went into another room.

Q. There at Police Headquarters?

A. Yes, sir.

Q. And you were not present at that time?

A. I walked in later on.

Q. What happened after you went into the room where the two of them were?

A. It was just discussed whether or not Investigator Boggess was talking to him and he decided at that point that he would go over to CID Headquarters and give a statement.

Q. What time was that?

A. I don't know what time it was. I don't recall.

Q. And you are saying that Stewart just volunteered to give a statement at that point?

A. He agreed to go over to CID and give a statement and talk to us, yes. [S.T. 102, 103]

Q. Now, did you call — when did you first actually meet the Defendant Stewart?

BY INVESTIGATOR BOGGESS:

A. I believe it was on the evening of the 23rd.

Q. And where was that?

A. At the Fairfax County Identification Section.

Q. And where is that located?

A. In Police Headquarters.

Q. What was he doing at that time?

A. I'm sorry. Investigator Miles had transported Mr. Stewart back from Florida. I was off that day. I made a telephone call to Investigator Miles and from the conversation with him, I responded up to the Police Headquarters.

Q. You called Miles?

A. Yes, to see if he returned, you know, from what had transpired while he was in Florida.

Q. And what did Miles tell you if anything?

A. That I should come to the station. That Mr. Stewart wanted to talk to me.

Q. Did Miles tell you that he had not given a statement?

A. Yes. I asked Investigator Miles had he obtained a statement from Mr. Stewart and he said no.

Q. Did Miles tell you that Stewart, up until that point, did not want to give a statement?

A. He said he would make a statement if I would come in.

Q. Miles told you that Stewart had told him that he would give a statement if you came in?

A. Along those lines. In other words, he would make a statement if he could talk to me. Now, that statement didn't include whether he would make a statement. [S.T. 119, 120]

Q. What happened when you got to the Identification Section of the Police Department?

A. Well, they were in the process of fingerprinting and photographing Mr. Stewart. This took a period of time.

Q. What happened after that?

A. We went into a small room there in headquarters. From there we decided we'll go over to our office.

Q. Who went over to the small room in headquarters?

A. I think myself and Miles. I don't know whether Mr. Stewart did or not.

Q. It was definitely you and Miles in that room?

A. Yes, just for two or three minutes. From there we moved to the CID office.

Q. What did you and Miles discuss at that time?

A. I don't recall.

Q. Why did you go to CID?

A. That was more convenient. It was more comfortable. After we determined he was going to make

a statement, we had to obtain the service of a steno. This would take some time. She would be there. She would have a typewriter there, the paper and everything available.

Q. When did you find out there was going to be a statement given?

A. I think I talked to him briefly there in ID and asked him if he intended to make a statement. I think at this time he said he would because I was not going to stick around there if he wasn't going to make any statement. [S.T. 121-122]

Q. Did you give him or did you tell him that if you didn't make a statement then that you weren't going to take a statement from him?

A. I may have said something along those lines.

Q. Because it was your day off and as you said, you didn't want to be hanging around there?

A. Yes, sir.

Q. And did you tell him that if he got a lawyer, you probably wouldn't take a statement from him anyway?

A. I believe the way that went, I believe if he got an attorney, the attorney wouldn't let me get a statement.

Q. The lawyer would let you get a statement?

A. Would not.

Q. So, you said it was either give us a statement now or forget it?

A. We wouldn't have a chance to get it.

Q. That you could convict him even without a statement?

A. That was my opinion at the time, yes, sir. [S.T. 124]

Q. Wasn't there some mention about Lea or Rocky or Beth?

A. In reference to what, Mr. Brent?

Q. Well, with regard to what might happen to them if he didn't set the record straight?

A. No, He was — I think he was told that they stood a chance of being charged as accessories if the case could be proven against him and also if the Commonwealth Attorney concurred with that opinion. He was not told that for a statement we would not charge these people. [S.T. 132-133]

BY INVESTIGATOR MILES:

A. When I first walked in there, I identified myself to him and told him that I was there for the purpose of taking him back to Virginia.

I asked him at that time if he wanted to give me a statement. He stated to me at that time that he wasn't sure. He said he thought he wanted to consult with an Attorney, but he didn't know exactly what he wanted to do. [T.T. 9/15, 6]

He stated he wanted to know my opinion, what he should do. He said, "I want to talk to a lawyer." [T.T. 9/15, 7]

Q. When you talked to him, did he leave the ditinct impression with you that he wanted to talk to a lawyer before he gave a statement?

A. He gave me the impression from the way he expressed himself that he wasn't sure. He made statements, in one way he wanted to talk and in another way he didn't know exactly what he wanted to do. [T.T. 9/15, 19-20]

Q. Well, did you not go any further in your questioning in the morning on June 23rd because he told you he didn't want to give you a statement?

A. He said he wasn't sure whether he wanted to or not and when he — he was not advised of his rights at that point. I was just wondering whether or not he was going to talk to me and when he made the statement that he wasn't —

Q. Now, are you saying that he never told you that he wanted a lawyer?

A. He stated he wasn't sure whether he wanted — he didn't know. One time he would say I feel like I want to talk to you, but then — I don't know, and it finally got to a point where he said, "what do you think I should do?" [T.T. 9/15, 20-21]

Q. What was he told about whether or not his father could be there?

A. I don't recall the exact wording, but we said you are the one that is involved in this and he came out going over again with the Attorney and so forth and that just went away.

He called his father. We let him call his father.

Q. Well, would it be fair to say that the clear implication from you and Investigator Boggess was that his father couldn't be there during this questioning?

A. I would say that is correct, yes.

Q. So, you weren't going to allow his father to be there during the questioning?

A. No. [T.T. 9/15, 23-24]

Q. Did you tell him that if he got a lawyer, that you were not going to take a statement or that his lawyer would advise him not to make a statement.

A. I don't recall how that occurred. Like I said, I was in and out of the room. I believe I overheard portions of the statement of that type, yes. [T.T. 9/15, 26]

Q. Well, are you saying that you did not tell him that if he got a lawyer, the lawyer would not let him make a statement?

A. There was some wording. Like I said, I left the room. When I came back in, there was some wording — discussion taking place and I recall something along those lines about an Attorney about talking, but that's all I recall and when I sat back down at the table, things proceeded. [T.T. 9/15, 27]

Q. And you talked about or you heard Investigator Boggess talk about whether or not the lawyer would let him give a statement?

A. Something along those lines, yes. [T.T. 9/15, 28]

Q. Didn't you and Investigator Boggess say or imply that if he didn't make a statement at that time you weren't going to take a statement from him?

A. No. What I recall is that if he didn't make the statement at that time, he would be taken back and we would wait. [T.T. 9/15, 29]

It is submitted further, on this point, that there exists in the preceding excerpts sufficient correlation between Mr. Stewart's accounts of the events leading up to his statement and what the investigating officers themselves testified to, that it is not beyond reason that psychological coercion and manipulation had their effect upon the will of Mr. Stewart. Though it is conceded that warnings and waivers were flourished at him, it remains that token recognition of constitutional form cannot in this case overcome: sinister references to electric chairs; inferences that friends may go to jail; pompous dictates that court appointed attorneys will provide inadequate and even harmful counsel; and the cruel denial to have Mr. Stewart's own father near. In effect, the police, in the least, caused Mr. Stewart to believe that the

constitutional protections of silence and counsel, in his case, could become liabilities. It is not up to police to advise potential defendants what courts, jurys and lawyers might do.

5. It is submitted that Mr. Stewart was the subject of unconstitutional physical coercion due to a deprivation of sleep (*Schneckloth*, supra) caused by the unwarranted delay in the arrival of Investigator Miles in Florida after the June 15th telephone conversation, and as a result of being held under the arduous, coercive custody of Investigators Miles and Boggess in Fairfax from approximately 7:00 p.m., June 23, 1978, until he was turned over to Fairfax County Adult Detention officials during the early morning hours (4:00 a.m.) of June 24, 1978. (T.T. 9/15, 36) Furthermore, there could be found no indication in the record that Mr. Stewart was offered food while he was in the custody of the investigators. This is also an element of unconstitutional physical coercion (*Schneckloth*, supra). The following appears in the record:

Q. What did you have to eat or drink during this period of time?

BY MR. STEWART:

A. I had one cup of coffee at 3:00 in the morning.

Q. What time did they finish with you?

A. It was around 6:00 that following morning. [S.T. 55]

Q. 1:30 or 2:00. And how long were you kept there at the building where this interrogation took place?

A. From about nine, a little bit before 9:00, maybe like 8:45 until early that morning, six or 7:00 in the morning.

Q. How did you feel physically during this period of time?

A. I almost fell asleep.

Q. Was this early on or in the middle, later?

A. Around 12:00 I felt like I was going to fall asleep any minute.

Q. What if any breaks did you take or were you offered?

A. Hardly any, if any. I don't recall any. [S.T. 58-59]

Q. And you eventually went and signed it before a Notary Public and swore it was all true. Isn't that so?

A. Yes. I was also half-asleep when I read that thing. [S.T. 82]

6. It is submitted that even what was presented at trial as the voluntary statement of confession of Mr. Stewart did not reflect Mr. Stewart's own, complete accounting:

Q. Did you ask any questions that did not appear on the typewritten transcript of the tape recording?

BY INVESTIGATOR BOGGESS:

A. Reference to the case?

Q. Yes.

A. Not if they weren't important, they wouldn't have been on there. If there were important, they would have been on the statement. [S.T. 125-126] [Unfortunately, the importance of these excluded portions of Mr. Stewart's statement can never be determined.]

Q. Were there occasions when the tape was stopped and you would rewind parts of it and rerecord?

A. There were times —

Q. In response to a question?

A. There were times when the tape was stopped in order to clarify a point, yes, sir, which is not on the tape.

Q. And were there —was the tape recorder rewound and did you start the response to the question over again?

A. I think that may have happened once or twice. [S.T. 130]

BY INVESTIGATOR MILES:

Q. Was anything said about the Defendant's involvement in this case that was not tape recorded?

A. No. [S.T. 105]

Q. Did the Defendant say anything about his involvement in this offense that is not covered or is not included in the typed transcript?

A. Not that I recall, sir, no. [S.T. 106]

BY MR. STEWART:

Q. Was this being recorded?

A. No, it wasn't.

Q. So, they asked you questions and you answered. Is that correct?

A. Right, and they were making notes.

Q. And then what happened?

A. After they were done asking questions, Investigator Boggess told Investigator Miles to go out and get the tape recorder.

Q. Then what happened?

A. Then they ran through somewhat the same questions. Sometimes both of them were asking the same questions at the same time and they were recording it, turning it off and on, erasing stuff out of it.

Q. How long did this procedure take?

A. Two or three, two, three, three and a half hours.

Q. What kind of recorder was it? Was it reel to reel or cassette?

A. No, it was a small pocket recorder with a real small cassette in them.

Q. You testified that it was stopped?

A. Stopped, run back, started over. [S.T. 54-55]

Q. How frequently would the tape be stopped and rewound and started up again?

Q. Quite frequently.

Q. What would occur when the tape recorder was off?

A. Was on?

Q. Off.

A. Off.

Q. Or being rewound?

A. Just more questioning, kind of like a rehearsal.

Q. What did the investigators say to you during these periods when the tape recorder was off?

A. Things like watch what you say. Just go over how I was supposed to answer it and everything and what the next question was going to be.

Q. What is your recollection of how long this took?

A. Total recording time, at least three hours, maybe three and a half, four hours. Between three and four hours.

Q. And the cassettes were carried out as they were completed for the typist. Is that right?

A. Yes.

Q. When did you first start reviewing the transcribed pages, if you can recall?

A. 1:30, 2, 2:00.

Q. 1:30 or 2:00. And how long were you kept there at the building where this interrogation took place?

A. From about nine, a little bit before 9:00, maybe like 8:45 until early that morning, six or 7:00 in the morning. [S.T. 57-58]

A most significant portion of the record is the following:

Q. Have any threats or promises been made to you by anyone?

A. No, no promises per se, however, but Detective Boggess said that he could get a conviction of first degree murder without a statement from me.

He also did not imply that in fact that my making a statement would be better or worse for me. He did say that if I make a statement now, that it would make the Judge and the Jury look at me as if I were sorry about this involvement which could be better for me, but on the other hand, that if they, meaning Judge and Jury, took my statement as some form of a snow job, it could make it worse. [T.T. 9/15, 112]

Q. And further down in the questions they asked you, Mr. Stewart, "has any threats or promises been made to you by anyone in reference to giving this statement?" and your answer was, "no", wasn't it?

A. Yes, and they turned off the machine and we had an extensive conversation about it. [S.T. 81]

Q. Because you thought there was a mistake. Isn't that so?

A. I knew there was a mistake.

Q. Now, Mr. Stewart, in light of all those, I wonder, would you tell the Court why on page two where the question was asked, "has any threats or promises been made to you by anyone in reference to giving this statement," why didn't you cross out that no and put something else?

A. If you note on the back of my statement, I told them that that had to be put. This statement, "no promises per se. However, but Detective Boggess said that he could get a conviction of first degree murder without a statement from me. He also did not imply that in fact that making a statement would be better or worse for me. He did say that if I

made a statement now, that it would make the Judge and the Jury look at me as if I was sorry about this involvement which could be better for me, but on the other hand, if they, meaning if they, the Judge and the Jury took my statement as some form of snow job, it could make it worse."

Q. That's right. Now, that statement —

A. Noting on here, "no, no promises per se. However, but Detective Boggess said that he could get a conviction of first degree murder without a statement from me."

Q. Right.

THE COURT: You added that to the statement on the back?

THE DEFENDANT: Right.

BY MR. HORAN [The Commonwealth's Attorney]:

Q. And as a matter of fact, you had a great deal of discussion about that and you wrote that out in your own handwriting and then dictated that?

A. Right.

Q. So it would be in the statement?

A. Right.

Q. And they had no objection to that? They let you do that.

Now, I get back to my original question, Mr. Stewart, with all the changes you made in this document, why didn't you cross this out in reference to the question, "had any promise or threat been made to you?"

A. How can I prove any threats or promises have been made to me?

Q. Mr. Stewart, I am not asking you what you can prove. I am asking you why you didn't cross it out and put yes.

A. Because I couldn't prove it either way. That's the only — the back of the page is the best I could do to make it look like a threat was made to me and as far as I am concerned, Your Honor, as far as I am concerned, when they tell me they can get a conviction for first degree murder on something like this and give me the chair, *I didn't have any choice* but to make that statement to clear myself. [S.T. 86-88] [Emphasis added]

For purposes of clarification, lines 7-20 of page 112 of the September 15, 1978, trial transcript cited above, represent the flounderings of a drowning soldier who, unknown to him, has been tossed a line by the enemy and told "the line may or may not save your life, it is up to you whether or not to reach for it." Mr. Stewart's alleged voluntary statement of confession represents no more than "an impulsive and improvident response to a seeming but unreal advantage." *Brady*, supra, see also *Clark*, supra. Mr. Stewart uses the term "per se", in line 9 on page 112 of the September 15, 1978, trial transcript to indicate that though no explicit promise was made, an advantage has been insinuated as resulting from his cooperation. The element of coercion is represented by the assertions attributed to Investigator Boggess that a conviction of first degree murder could be had without Mr. Stewart's cooperation. The rest of the paragraph demonstrates, by itself, that Mr. Stewart had been made to understand that, in effect, he should do now what he could to help himself (grab the line while you can), and that by making a statement that didn't sound like a "snow job" he could prevent the wrath of judge and jury from ending his life. So, with one hand the line is tossed to the drowning man and with the other hand, it is slowly pulled away; Mr. Stewart reached for the line with a confession implicating himself in capital murder. The subtle torment which caused this act must now result in that act's nullification.

7. Finally, it is submitted that the trial court failed to correctly apply the law to the facts developed at the suppression hearing through the testimony of both the investigating officers and the defendant. The court erroneously based its decision to allow Mr. Stewart's statement into evidence at trial *solely* on the credibility of the witnesses, completely ignoring the conflicts between the investigator's testimony concerning the handling of Mr. Stewart and, most fatally, ignoring the totality of the circumstances and, thus, the unconstitutional assaults upon Mr. Stewart's will of self-determination revealed by that same testimony.

"Compare the events that occurred during this interrogation with established interrogation practices criticized in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The court referred to police manuals and texts, then in general use, in its discussion:

The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is privacy — being alone with the person under interrogation'. *Miranda v. Arizona*, 384 U.S. 436, 449, 86 S.Ct. 1602, 1615, 16 L.Ed.2d 694 (1966).

'To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details . . . These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already — that he is guilty. Explanations to the contrary are dismissed and discouraged.' Id. at 450, 86 S.Ct. at 1615.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

'[T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. . . The interrogator may also add, Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' Id. at 454, 86 S.Ct. at 1617.

The manuals also contain instructions for police on how to handle the individual who refused to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. 'This usually has a very undermining effect. . . .' Id. at 548, 86 S.Ct. at 1617.

The Miranda Court, in condemnation of then current police interrogation practices, practices similar to those employed in this case, was concerned with the obvious evils attendant upon such procedures." *Clark*, supra, 805, N1.

". . . For ye are like unto whited sepulchers, which indeed appear beautiful outward, but are within full of dead men's bones . . ." St. Matthew 23:27.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari to the Circuit Court for the County of Fairfax, Commonwealth of Virginia should be granted for the reasons set forth above.

This relief is respectfully prayed for.

J. RONALD LYNCH
JOHN FRANK LEINS
HOWARD, STEVENS,
LYNCH, CAKE &
HOWARD, P.C.
128 North Pitt Street
Alexandria, Virginia 22314

Counsel for Petitioner

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 31st day of May, 1979.

Charles D. Stewart, Appellant,

against Record No. 790336
Circuit Court No. C-27466

Commonwealth of Virginia, Appellee.

From the Circuit Court of Fairfax County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

And it is ordered that the Commonwealth recover of the appellant the costs in the court below.

A Copy,

Testee:

Allen L. Lucy, Clerk

By: /s/illegible
Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

July 17, 1978

COMMONWEALTH OF VIRGINIA	) INDICTMENT FOR) CAPITAL MURDER) AND USING A FIRE-
vs.	) ARM IN THE) COMMISSION OF A
CHARLES D. STEWART	) FELONY

COUNT I

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its July Term, 1978 charges that: On or about the 31st day of January, 1978 in the County of Fairfax, Charles D. Stewart did feloniously, for hire, willfully, deliberately, and premeditatedly kill and murder George Harold Scarborough. Va. Code §18.2-31

COUNT II

The Grand Jurors of the Commonwealth of Virginia, in and for the body of the County of Fairfax, and now attending the said Court at its July Term, 1978 charges that: On or about the 31st day of January, 1978 in the County of Fairfax, Charles D. Stewart did display a firearm in a

threatening manner while committing the murder of George Harold Scarborough. Va. Code §18.2-53.1

A True Bill_____

No True Bill _____

_____
FOREMAN

Witnesses subpoenaed, sworn and available to testify before the Grand Jury:

Inv. G. Boggess, Fairfax County Police Dept.

APPENDIX C

"On the basis of the credibility of the witnesses I find that this statement was given in a voluntary manner after proper warning and it was not forced nor were any promises or inducements given.

Your exception is noted, sir.

(Exception noted.)" [S.T. 138]

APPENDIX D

THE COURT: I am going to tell them now, sir. I will forget it later. I don't think it's going to hurt if I tell them now.

MR. BRENT: All right, sir. Please note my exception to the admission.

THE COURT: Certainly, under the previous grounds stated.

MR. BRENT: Yes.

(Exception noted.)

(The Proceedings resumed within the hearing of the Jury.)

MR. HORAN: Your Honor, I would offer Commonwealth's Exhibit No. 11.

THE COURT: It will be received. By agreement of both parties, certain parts have been deleted as being irrelevant, going to matters not related to this case. One small portion the Court ruled on by agreement of the parties, but you will have read to you the admissible parts of this.

You will also have by the time the case is submitted to you a copy of it without the deletions. I am explaining this to you because there may be some blank spaces here or there are pages missing and that's the reason the Court has ruled that those parts have nothing to do with the case.

(The document referred to, heretofore marked for identification as Commonwealth's Exhibit No. 11 was received in evidence.)

MR. HORAN: Your Honor please, I would ask that it be read to the Jury at this time." [T.T. 9/15, 17-18]

APPENDIX E

VERDICT

"THE CLERK: Mr. Brant and members of the Jury, have you reached a verdict?

THE FOREMAN: We have.

THE CLERK: Is your verdict unanimous?

THE FOREMAN: Yes, sir.

THE CLERK: We, the Jury, on the issue joined in the

case of Commonwealth of Virginia versus Charles D. Stewart, Defendant, find the Defendant guilty of capital murder for hire as charged in the Indictment." [T.T. 9/15, 162]

APPENDIX F

VERDICT

"THE CLERK: Mr. Brant and members of the Jury, have you fixed a punishment?

THE FOREMAN: We have.

THE CLERK: Is your decision unanimous?

THE FOREMAN: It is.

THE CLERK: We, the Jury, on the issue joined in the case of Commonwealth of Virginia versus Charles D. Stewart, Defendant, having found the Defendant guilty of the willful, deliberate and premeditated murder for hire of George Harold Scarborough, and having found that the Defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved a depravity of the mind or aggravated battery to the victim, and having considered the evidence in mitigation of the offense, we unanimously fix his punishment at death." [T.T. 9/15, 212]

APPENDIX G

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	) CRIMINAL NUMBER) 27466)
VERSUS	) INDICTMENT - CAPI-) TAL MURDER AND
CHARLES D. STEWART	) USE OF A FIREARM) IN A FELONY

ORDER

This 11th day of December, 1978, came the Attorney for the Commonwealth, and CHARLES D. STEWART, who stands convicted of a felony, to-wit: Capital Murder For Hire, Virginia Code Section 18.2-31, as charged in Count I of the Indictment, was led to the bar in the custody of the jailer of this Court and came also A. Strode Brent, his attorney heretofore appointed.

Whereupon the attorney for the defendant moved the Court to set aside the verdict of the jury on grounds stated to the record, which motion was DENIED and exception was noted.

And the Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open court with a written report, which report he presented to the Court in open court in the presence of the defendant who

was fully advised of the contents of the report and a copy of said report was also delivered to counsel for the accused.

Thereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in the said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case.

Whereupon the Cour taking into consideration all of the evidence in the case, the report of the Probation Officer and such additional facts as were presented by the Attorney for the Commonwealth, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgement;

It is ADJUDGED and ORDERED that the defendant is hereby sentenced to confinement in the penitentiary of the Commonwealth Of Virginia for the remainder of his natural life.

Thereupon the Attorney for the Commonwealth moved the Court to enter a nolle prosequi to Count II of the Indictment, which motion the Court GRANTED without objection by the accused or his counsel.

After pronouncing sentence, the Court advised the defendant of his right to petition for an appeal to the Supreme Court Of Virginia and his right to proceed in forma pauperis and to have the assistance of court-appointed counsel.

And the Court appoints A. Strode Brent, an able and competent attorney at law to represent the defendant in said appeal.

The Court certifies that at all times during the trial of this case the defendant was personally present and A. Strode

Brent, his attorney, was likewise personally present and capably represented the defendant for which services he is allowed an attorney's fee of $400.00.

The defendant is remanded to jail to await transfer to the penitentiary.

D O B: 11/29/56

JAIL CREDIT:

/s/ WILLIAM G. PLUMMER
JUDGE WILLIAM G. PLUMMER

A COPY TESTE:
JAMES E. HOORNAGLE, CLERK

79-137

IN THE SUPREME COURT
OF THE UNITED STATES

CHARLES D. STEWART
Appellant

vs.

COMMONWEALTH OF VIRGINIA
Appellee

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

ROBERT F. HORAN, JR.
Commonwealth's Attorney for Fairfax County
Fairfax County Courthouse
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Fairfax, Virginia 22030

Counsel for Appellee

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CITATION

IN THE SUPREME COURT
OF THE UNITED STATES

CHARLES D. STEWART
Appellant

vs. Record No. 79-137

COMMONWEALTH OF VIRGINIA
Appellee

BRIEF IN OPPOSITION TO PETITION FOR APPEAL

TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

COMES NOW the Commonwealth in response to the Petition for Appeal herein filed by Charles D. Stewart, and states that no error was committed in the Circuit Court of Fairfax County, Virginia.

STATEMENT OF MATERIAL PROCEEDINGS

The Commonwealth agrees with the Appellant's Statement of the Case.

STATEMENT OF FACTS

The Commonwealth feels that the facts may be presented more succinctly, as taken from the transcript of the suppression motion hearing of September 8, 1978, than given in Appellants' Brief.

On June 15, 1978, Charles D. Stewart surrendered in Dade County, Florida. Stewart was confined in the Dade County jail from where, pursuant to a message given him, he telephoned Sergeant Wilson and Investigator Boggess of the Fairfax County Police Department. This conversation centered around Stewart's plans to waive extradition proceedings, the offense for which he was being held and his willingness to make a statement regarding his participation in that offense. During this conversation, Sergeant Wilson advised Stewart that he was charged with capital murder, discussed the commensurate penalties and expressed his opinion that Stewart could be convicted without the aid of his statement in evidence. (S.T. 113, 114) Stewart indicated his desire to give a statement and attempted to bargain for the guarantee of the investigators that he receive a five year sentence in return. Boggess

later stated that no such guarantees were ever made. (S.T. 132)

On June 23, 1978, Investigator Miles of the Fairfax County Police Department arrived at the Dade County jail. (S.T. 92, 93) Investigator Miles met Stewart at 10:05 A.M., informed him that Miles would be transporting him back to Fairfax County and asked him if he wanted to make a statement. Stewart stated he was not sure whether or not he wanted to talk to Miles and equivocally expressed a desire to see an attorney. (S.T. 93) Stewart then spontaneously began to make a statement concerning his whereabouts during the Scarborough killing. At this point, Miles stopped Stewart and read to him the constitutional rights required by Miranda from a standard Fairfax County Police Department warning and consent form. Stewart answered affirmatively to all questions read to him from the form by Miles. Miles then asked Stewart whether or not he wanted to make a statement. Stewart's response was to ask Miles' advice. Miles then repeated to Stewart his earlier warnings regarding Stewart's right to make a statement or to refuse to make a statement. (S.T. 95) Stewart again vascillated saying he was not sure what course of action to take. With

this response, Miles immediately ceased his inquiry and advised Stewart of his plans to return later in the day. (S.T. 95)

At 2:00 P.M. the same day, Miles returned to the jail, picked up Stewart and drove him to the airport where he was secured in a holding cell until the plane's departure. While at the airport, Miles told Stewart that Clark, the other murderer, had been arrested in California and that he had given a statement. Miles discussed no details of the statement with Stewart. (S.T. 96)

During the flight, Stewart expressed a desire to give a statement to Investigator Boggess. Investigator Miles assured Stewart he would arrange to have Boggess present upon their return. No other topics pertinent to the charge were discussed on the flight. (S.T. 98)

While Miles was booking Stewart at Fairfax County Police Headquarters building, Boggess arrived. While at police headquarters, Stewart voluntarily agreed to accompany both detectives to their office at Criminal Investigations Division

(located in a nearby building), (S.T. 99) Once in the office, Stewart called his father and subsequently read and signed a standard warning and consent form. (S.T. 108) Stewart specifically declined to speak with an attorney and readily consented to give a statement. (S.T. 106)

The warning and consent form was signed by Stewart at 9:32 P.M. and the interview ended at 11:40 P.M. (S.T. 108, 109) Stewart read each page as it was typed, made necessary corrections, inititaled each page and noted the time of 1:36 A.M. on each page. (S.T. 110). Stewart made approximately forty-five corrections in the sixty-one page statement. (S.T. 82, 83) During the session, Stewart never indicated that he was tired and was offered coffee or coke to drink. (S.T. 110) Investigator Miles testified that the tape was only turned off to change a tape or to save tape during long pauses. (S.T. 105) Investigator Boggess testified that all important parts of the statement were on the tape and further testified that the tape may have been stopped once or twice to clarify a point. (S.T. 126-130)

The statement made by Stewart concluded on the last page of his confession is the result of a discussion between Boggess and Stewart. Stewart wanted the detectives to guarantee that his statement would help him in his trial. (S.T. 131,132) Both detectives told Stewart that his statement could help him or hurt him at trial. In response to this, Stewart composed and read into the tape the statement on the last page. (S.T. 132)

ARGUMENT

The crucial issue for decision in the case at bar is the voluntariness of the Petitioner's confession. He would have this Court believe that his confession was induced by implied coercion and therefore, wrongfully admitted into evidence by the trial court. The Petitioner would attempt to persuade this Court through a lengthy brief citing numerous cases which touch the constitutional substantive law of confessions. These cases, however, fail to address the issue of how much weight is to be accorded to the trial court's finding of voluntariness.

The Commonwealth submits that in spite of the Petitioner's exhaustive

study, he has failed to cite the recent decision by this Court which is directly on point. Every point in the decision in Witt v. Commonwealth, 215 Va. 670 (1975) is paralleded by similar points in the case at bar.

First, the issue in Witt was whether or not the defendant's confession was induced by implied coercion.

Second, the evidence presented at the suppression motion in Witt, as in this case, was in conflict. The testimony of the Petitioner materially differs from the testimony of the police investigators.

Finally, a source of the alleged coercion in both cases was the defendant's perception of an unsupported implication by the police that a third person (in Witt, defendant's wife and in this case, Petitioner's girlfriend) could be arrested if the defendant did not confess.

In Witt, as in this case, the trial court found the confession to be voluntary and thus admitted it into evidence. This Court then held that the voluntariness of a confession must

be proven by a preponderance of the evidence, and further held that the trial court must determine from the evidence whether the confession was freely and voluntarily given.

This Court went on to present these guidelines to the trial court:

> In determining whether the Commonwealth has met its burden, the trial court, acting as fact finder, must evaluate the credibility of the witnesses, resolve the conflicts in their testimony, and weigh the evidence as a whole. Its factual finding is to be given the same weight by the appellate court as is accorded the finding of fact by a jury. Factual findings of voluntariness are not disturbed on review unless plainly wrong.

In this case, as in Witt, the suppression hearing was extensive. For more than four hours counsel examined the Petitioner and both investigating police officers. There is no doubt that some of the evidence was in dispute, but in the end, the trial court judge resolved

discrepancies in favor of the Commonwealth. ". . .I find certain portions of the defendant's testimony to be apparently incredible." (S.T. 137) "On the basis of the credibility of the witnesses, I find that this statement was given in a voluntary manner after proper warning and it was not forced nor were any promises or inducements given." (S.T. 138)

CONCLUSION

The Commonwealth agrees that the issue here is voluntariness of the statement. The trial court examined all relevant testimony and decided that the statement was freely given, and because of the holding in Witt, the trial court's ruling should not be disturbed unless plainly wrong.

Respectfully submitted,

Robert F. Horan, Jr.
Commonwealth's Attorney

CERTIFICATE OF SERVICE

I, Robert F. Horan, Jr., Commonwealth's Attorney for Fairfax County, Virginia, and duly qualified to practice in this Court, hereby certify that a copy of this Brief in Opposition was mailed to John Frank Leino, Esquire, 128 N. Pitt Street, Alexandria, Virginia 22314, this 16th day of October, 1979.

Robert F. Horan, Jr.